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In the Supreme Court of the United States

TRIBAL GOVERNING BOARD OF THE LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, PETITIONER

v.

SANDRA THOMAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a Tribe's governing body is a necessary party to a suit by a voter challenging the Secretary of the Interior's decision under 25 U.S.C. 461 to nullify the results of an election ratifying amendments to the Tribe's constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 189 F.3d 662. The opinion of the district court (Pet. App. A17-A37) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1999. A petition for rehearing was denied on December 13, 1999 (Pet. App. A58). The petition for a writ of certiorari was filed on March 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Indian Reorganization Act (IRA) authorizes any Indian Tribe to "adopt an appropriate constitution" through "a special election authorized and called by the Secretary [of the Interior] under such rules and regulations as the Secretary may prescribe." 25 U.S.C. 476(a) and (a)(1). A Tribe's constitution becomes effective upon the Secretary's approval. 25 U.S.C. 476(a)(2) and (d). The IRA also authorizes the Secretary to conduct elections to ratify amendments to tribal constitutions and to approve the results of those elections. 25 U.S.C. 476(c)(1)(B) and (2)(B), 476(d). The IRA provides that the Secretary shall approve a constitution or an amendment within 45 days after the election unless he finds that the constitution or amendments are contrary to applicable law. 25 U.S.C. 476(d)(1).

If the Secretary receives a valid request to hold an amendment ratification election, and the Secretary determines that the proposed amendments are legal, the Secretary must call an election within 90 days. 25 U.S.C. 476(c)(1)(B); 25 C.F.R. 81.5(d). To become effective, election results must receive the Secretary's approval. Any qualified voter may contest the results to the Secretary within three days of the election. 25 C.F.R. 81.22. The Secretary has 45 days to review such election challenges and to decide whether to approve the election results. 25 U.S.C. 476(d)(1). IRA affords a private right of action to enforce its provisions in federal district court. 25 U.S.C. 476(d)(2).

2. Respondent Sandra Thomas is a member of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians (the Tribe). Pet. App. A2. Thomas served as chairperson of a committee to draft proposals to amend the Tribe's constitution. *Ibid.* The committee eventu-

ally adopted four proposals and submitted them to the Bureau of Indian Affairs (BIA) in the Department of the Interior. *Id.* at A2-A3. The BIA called for an election on two of those proposals – Proposed Amendments A and B. *Id.* at A3. Proposed Amendment A redefines tribal membership in terms of lineal descendancy rather than blood quantum. *Ibid.* Proposed Amendment B lengthens the term of office for elected tribal officials. *Ibid.*

The BIA conducted an election on the two proposals. Pet. App. A3. Both proposed amendments received a majority of the votes cast. *Ibid.* Several tribal members, including the Chairman of the Tribe's governing board, contested the election results. *Ibid.* The BIA rejected the challenges and formally approved the amendments to the Tribe's constitution. *Ibid.*

The Chairman of the Tribe's governing board sought further review of that decision. Pet. App. A4. In response, the BIA revoked its approval of the election results. *Ibid.* The BIA concluded that elections to ratify constitutional amendments must be open to the same class of voters who were entitled to vote in the election adopting the constitution, and that a significant percentage of those voting on Amendments A and B did not meet the voting criteria for the original constitutional election. *Ibid.* The BIA stated that it intended to conduct a new election on the proposed amendments. *Ibid.*

3. Respondent Thomas and others (respondents) filed suit against the Department of the Interior, the Secretary of the Interior, and several other federal officials (federal respondents), challenging the BIA's disapproval of the election results. Respondents alleged that (1) the BIA's disapproval exceeded the 45-day period allowed for such action; (2) the BIA's action

was arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. 706(2); and (3) the BIA violated the federal government's trust responsibility to the Tribe. Pet. App. A5. The federal respondents moved to dismiss on the ground that the Tribe's governing board (petitioner) is a necessary and indispensable party to the action within the meaning of Federal Rule of Civil Procedure 19. *Ibid.*

The district court initially denied the motion to dismiss. Pet. App. A38-A57. The court concluded that petitioner is a necessary party under Rule 19. *Id.* at A54-A55. The court reasoned that the "proposed amendments deal with matters of fundamental importance to the tribe," *id.* at A53; that if respondents prevailed," the BIA could be exposed to additional litigation" initiated by petitioner, *id.* at A53-A54; and that "even if the BIA decision is reversed and the 1992 results are reinstated, [petitioner] may frustrate efforts to enforce the amendments," *id.* at A54. The court declined to dismiss the action, however, on the ground that petitioner might join the action voluntarily or waive its immunity if joined by respondents. *Id.* at A55-A56.

Petitioner declined to become a party. Pet. App. A5. Respondents then amended their complaint to name petitioner as a defendant. *Id.* at A6. Petitioner and the federal respondents moved to dismiss, and the court granted the motions. *Id.* at A17-A37. The district court held that claims against petitioner were barred by tribal sovereign immunity. *Id.* at A26-A27. The court dismissed the claims against the federal respondents for failure to join a "necessary" and "indispensable" party under Rule 19. *Id.* at A28-A31.

4. The court of appeals reversed, holding that petitioner is not a "necessary" party under Rule 19(a). Pet.

App. A1-A13. While the court accepted the district court's finding that petitioner has a strong interest in the subject matter of the litigation, it concluded that "the fact that a tribe has an interest in the litigation is not enough in itself to make it a necessary party in the sense of Rule 19." *Id.* at A9. Noting that "the IRA explicitly reserves to the federal government the power to hold and approve the elections that adopt or alter tribal constitutions," *id.* at A8, and that Congress had "refused to reflect the tribal interest in the legal structure of tribal constitutional elections," *id.* at A10, the court of appeals concluded that "the district court erred in finding the governing board had to be included in the lawsuit based on the depth of the tribe's interest in the matters addressed in the Secretarial election," *ibid.*

The court also was not persuaded "that there is a legally cognizable risk of incomplete relief." Pet. App. A10. The court reasoned that "the tribal governing board has no legal authority to refuse to implement amendments to the tribal constitution that have been put to a vote and approved by the Secretary." *Ibid.*

The court of appeals also rejected the argument that the threat of future litigation by petitioner against the BIA was sufficient to make petitioner a "necessary" party. Pet. App. A10-A11. The court reasoned that such a conclusion "would be tantamount to holding that all voters [in elections to ratify tribal constitutions] are necessary parties," because all such voters would "have the same standing to sue and might some day exercise it." *Id.* at A11. Finally, the court noted that its decision leaves petitioner free to protect its interest in litigation through intervention or participation as amicus curiae, and at the same time "does not slam the courthouse door in the face" of those "who seek only to invoke the

judicial oversight of the Secretary's actions provided for in 25 U.S.C. § 476(d)(2)." *Id.* at A12.

ARGUMENT

Petitioner contends (Pet. 5-24) that a Tribe's governing body is a necessary party to a suit by a voter challenging a decision by the Secretary of the Interior to disapprove the results of an election ratifying amendments to a tribal constitution. The court below, however, is the first court of appeals to issue a published decision on that question. Moreover, the court's Rule 19 decision turns on its assessment of the specific statutory scheme at issue; it does not raise any more general issue under Federal Rule of Civil Procedure 19. Review by this Court is therefore not warranted.*

1. a. Petitioner first contends (Pet. 7-13) that the court of appeals' decision conflicts with decisions of this Court holding that Tribes retain their powers of self-government except to the extent that they have been limited by Congress. The court of appeals, however, recognized that Tribes retain their powers of self-government except to the extent that they are limited by Congress. Applying that principle, the court concluded that the specific statutory scheme at issue significantly limits the powers of an IRA Tribe over the process for

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* The district court dismissed the claims against petitioner on sovereign immunity grounds, Pet. App. A26-A27, and then dismissed the claims against the federal respondents on the ground that the Tribe was an indispensable party that could not be joined, *id.* at A28-A31. Although the court of appeals reversed the latter holding, it did not reverse the former. There accordingly is some question whether petitioner, which of course does not challenge the ruling that it is protected by sovereign immunity, is a "party" that may invoke the Court's certiorari jurisdiction under 28 U.S.C. 1254(1).

amending tribal constitutions. Pet. App. A8-A10. In particular, the court noted that the IRA gives the Secretary of the Interior the power to hold and approve the elections that alter IRA tribal constitutions, *id.* at A8, that Congress had rejected a recommendation to give Tribes the authority to decide election challenges, *id.* at A9, and that Congress gave individual voters a statutory right to seek judicial review of the Secretary's election disapproval decisions, *id.* at A12.

Those considerations based on the IRA itself, and not the court's failure to apply the background principle that a Tribe retains its powers of self-government in the absence of limitation by Congress, led the court to conclude that petitioner does not have the kind of interest that would make it a necessary party to the present litigation. Petitioner's first contention therefore does not warrant review.

b. Petitioner next contends (Pet. 15-16) that the United States has a conflict of interest that disables it from adequately representing petitioner's interest. The court of appeals, however, did not hold that the United States could adequately represent petitioner's interest in the litigation. Instead, as discussed above, it held that petitioner does not have the kind of interest in the present litigation that would make it a necessary party in the first place. Pet. App. A8-A10. The question whether the United States can adequately represent petitioner's interest is therefore not properly presented here.

Even if the question were properly presented, however, it would not warrant review. In support of its contention that the United States has a disabling conflict, petitioner argues (Pet. 16) that respondents sought money damages against both petitioner and the federal respondents, and that the United States has a

different view from petitioner on the meaning of certain provisions of the Tribe's constitution. Respondents, however, have waived their money damages claims. Pet. App. A5, A12. Moreover, respondents' complaint does not raise any issue concerning how the Tribe's constitution should be interpreted. The circumstances identified by petitioner therefore do not suggest that the United States has a conflict of interest that would disable it from adequately representing petitioner's interest in this case. In any event, the question whether those circumstances give rise to a conflict of interest is fact-bound; it does not raise any issue of general importance warranting this Court's review.

c. Petitioner also contends (Pet. 17-18) that it is a necessary party because, in its absence, complete relief cannot be afforded among the existing parties. In particular, it contends that the constitutional amendments at issue direct petitioner to enact an ordinance implementing the amendments, and that, if respondents prevail in the present litigation, petitioner might adopt an ordinance that respondents find unsatisfactory. Respondents, however, have not sought in the present litigation to affect whatever discretion petitioner might have in implementing the constitutional amendments. Instead, they have sought only to invalidate the Secretary's disapproval of Proposed Amendments A and B and to restore the legal validity of those amendments. Pet. App. A4-A5. The possibility that petitioner might implement the constitutional amendments in a way that respondents find unsatisfactory therefore does not affect a court's ability to award complete relief in the present case should it rule in respondents' favor.

In any event, petitioner's complete relief argument, like its conflict-of-interest argument, affects only the parties to the present litigation. It does not raise any

issue of general importance warranting this Court's review.

2. Petitioner also errs in contending (Pet. 18-21) that the court of appeals' decision conflicts with *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *Florida* v. *Seminole Tribe*, 181 F.3d 1237 (11th Cir. 1999). In the first of those decisions, this Court held that Congress does not have power under the Indian Commerce Clause to abrogate a State's sovereign immunity from suit under the Eleventh Amendment. It therefore held that the Seminole Tribe was barred from suing the State of Florida to enforce the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.* In *Florida* v. *Seminole Tribe*, *supra*, the Eleventh Circuit held that an action brought by the State against the Tribe to enforce provisions of IGRA was barred by tribal sovereign immunity. Neither case involved any question concerning the statutory scheme at issue here or Rule 19. There is therefore no conflict between the decision below and those decisions.

3. Finally, petitioner contends (Pet. 22-24) that the court of appeals erred in holding that, in order to be considered a necessary party, a Tribe must first pursue its own legal remedies against the Secretary. The court of appeals, however, did not impose any such requirement. Before observing that petitioner had failed to exercise its statutory right to challenge the Secretary's initial approval of the constitutional amendments, the court first decided on other grounds that petitioner is not a necessary party to the present litigation. Pet. App. A8-A11. The court then concluded that petitioner should not be able to use its failure to follow the prescribed statutory procedures for challenging the Secretary's approval of the amendments as a basis for creating an interest that would give it necessary party

status. *Id.* at A11-A12. That unremarkable conclusion does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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